



March 1, 2002

**VIA ELECTRONIC FILING**

William F. Caton  
Acting Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband  
Telecommunications Services; CC Docket No 01-337

Dear Mr. Caton:

Attached are comments of the Association for Local Telecommunications Services  
("ALTS") for filing in the above-captioned proceeding.

Sincerely,

/s/

Teresa K. Gaugler

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of Regulatory Requirements for	)	
Incumbent LEC Broadband	)	CC Docket No. 01-337
Telecommunications Services	)	
	)	

**COMMENTS OF THE  
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Services (“ALTS”) hereby files its comments in the above-referenced proceeding in response to the Commission’s Notice of Proposed Rulemaking regarding regulatory treatment of incumbent local exchange carrier (“ILEC”) broadband telecommunications services.<sup>1</sup> The Commission requests comment on various definitional issues as well as appropriate regulatory requirements for ILECs’ retail broadband services, noting that dominant ILECs are currently subject to tariff filing, tariff support, and pricing requirements.<sup>2</sup>

The Commission indicates that it seeks to “best balance the goals of encouraging broadband investment and deployment, fostering competition in the provision of broadband services, promoting innovation, and eliminating unnecessary regulation.”<sup>3</sup> ALTS shares the Commission’s goals and believes the best public policy is to encourage deployment of

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<sup>1</sup> *Notice of Proposed Rulemaking*, In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337, FCC 01-360 (rel. December 20, 2001) (“NPRM”).

<sup>2</sup> NPRM at 4.

<sup>3</sup> *Id.*

broadband services by continuing to foster both inter-modal and intra-modal facilities-based competition.<sup>4</sup> Competitive local exchange companies (“CLECs”) have invested over \$56 billion in constructing new broadband telecommunications networks since the passage of the Telecommunications Act of 1996. The CLECs were the first companies to introduce DSL into the marketplace and developed many other innovative technologies based upon the unbundling rules set out to enforce the 1996 Act. The best way to advance the deployment of broadband technologies is to enforce the current policies that promote facilities-based competition.

Competition policy should not favor one form of technology over another or one mode of broadband access over another. Regulatory policies should not be aimed at selecting winners and losers in the marketplace, but should encourage competition among the broadest range of providers. Most importantly, intra-modal competition between ILECs and CLECs must be promoted regardless of the level of inter-modal competition between LECs, wireless and satellite providers, and cable modem providers. DSL was first deployed by Covad by adding its own electronics to the copper loop provided by the ILEC. A policy that focused only on inter-modal competition might have denied American consumers the tremendous benefits of this technology. Furthermore, without intra-modal competition for DSL-based and other advanced services, the best one could hope for is a duopoly with ILECs and cable modem providers as the only providers of broadband services to residential customers. The scenario would be even bleaker for small business customers, who have no access to cable modem facilities and will, therefore,

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<sup>4</sup> The Commission defines “‘intramodal competitors’ as those competitive providers whose services are either delivered partially or wholly over incumbent LEC facilities, or over platforms using the same or similar technology that the incumbent LEC has deployed. ‘Intermodal competitors’ are competitive providers that rely exclusively on alternative technological platforms than those deployed by incumbent LECs to deliver similar services.” NPRM at 15 n. 60.

be subject to the unregulated monopoly power of the ILECs. Since competition is the best engine to drive broadband deployment, the ILECs must continue to make available unbundled network elements to competitors.

ALTS understands the Commission's goal to eliminate unnecessary regulation but believes that the amount of regulation should be tailored to the amount of competitive facilities in the marketplace. For instance, regulation should be utilized to the extent necessary to prevent anti-competitive behavior and monopolization of the market by ILECs. As facilities-based competition increases and ILECs no longer enjoy market power in the local telecom market, reducing regulatory oversight will be appropriate. Until such competing facilities and services are fully available, however, regulation and enforcement are necessary to ensure that competitors have access to the ILEC bottleneck facilities in order to provide competing services to consumers and to promote the deployment of broadband technologies.

**I. THE COMMISSION SHOULD NOT BEGIN TO CONSIDER WHETHER AN ILEC IS NON-DOMINANT IN THE BROADBAND TELECOMMUNICATIONS MARKET BEFORE FULLY DEFINING THAT MARKET.**

The Commission begins the *NPRM* by seeking comments on the proper definition of the broadband telecommunications services market. Without providing a framework for further comments, it then immediately asks whether the ILECs possess market power in that market. Without a clear answer to the first inquiry, however, it is near impossible for parties to appropriately address the second one. Parties will be forced to base their comments on their own underlying assumptions, many of which will be conflicting, thus making this inquiry futile until the market definition is clear to all parties.

ALTS submits that the Commission should first consider the comments filed in this proceeding in order to properly define the broadband telecommunications services markets.

Once that definition has been firmly established, then the Commission should solicit additional comments to evaluate the status of ILECs in the relevant markets. As it stands, it is unclear what products and services are to be included in the definition of “broadband.” In fact the Commission states that it uses the term “in a very general sense to describe a broad array of high-speed telecommunications services.”<sup>5</sup> Moreover, the Commission has not clearly established the geographic area comprising the broadband market and merely mentions differing approaches proposed by parties without even suggesting that one might be more appropriate.<sup>6</sup> It is a waste of Commission and industry resources to evaluate the status of ILECs in such a hypothetical broadband market.

In assessing an ILEC’s market power, ALTS proposes that the Commission should evaluate the ILEC’s market position in the relevant LATA geographic market.<sup>7</sup> The Commission suggests that the definition of the relevant product market should consider reasonably substitutable services and customer classes.<sup>8</sup> For the mass residential market, the broadband market may consist of services, such as DSL, cable modem, wireless and satellite broadband access services. There has not been widespread deployment of wireless and satellite services, and many satellite services utilize wireline uploads. Also, satellite and wireless technologies are far more expensive than DSL and cable modem services and are of interest mainly to customers in rural areas that have not been wired for cable or DSL.<sup>9</sup> Thus, the

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<sup>5</sup> *Id.* at 2.

<sup>6</sup> NPRM at 15-16.

<sup>7</sup> *Id.* at 16.

<sup>8</sup> *Id.* at 11-15.

<sup>9</sup> Saul Hansell, *Demand Grows for Net Service at High Speed*, New York Times, December 24, 2001.

Commission must determine if demand is truly elastic for all of these alternative products and services.

On the other hand, in the small to medium-sized business market, the product market is limited primarily to DSL-based services or dedicated T1/DS-1 lines, provided by both ILECs and CLECs. There is no inter-modal alternative to the ILEC's services, thus the ILEC must be considered a dominant carrier with market power. In the large business market, there are a multitude of products, including frame relay, ATM, DS-3, and OC-x, provided by both ILECs and CLECs. The Commission must assess the level of competition in geographic areas before finding an ILEC non-dominant in that market.

There are still a large number of residential areas where no cable modem alternative exists. In those areas, the ILEC clearly remains the dominant broadband provider. Even in areas where a cable modem alternative exists, the ILECs may still possess market power, especially if they maintain significant market share. Moreover, the existence of one alternative provider or limited competition in a geographic area does not signify that the ILEC serving that area lacks market power. The Commission should not assume because alternatives exist to the ILECs' DSL services throughout the country that each ILEC is non-dominant in its area. In other words, the Commission cannot simply find that some broadband alternatives exist in some markets for some classes of customers, and then declare all of the ILECs non-dominant based on that finding alone.

## **II. THE COMMISSION SHOULD NOT DECLARE ILECS NON-DOMINANT IN THE RETAIL BROADBAND MARKET WHILE THEY CONTINUE TO POSSESS MARKET POWER IN THE WHOLESALE MARKET FOR ESSENTIAL FACILITIES FOR COMPETITORS**

ALTS strongly urges the Commission to consider the ILECs' behavior and incentives in the wholesale market when considering regulatory treatment of their retail services.<sup>10</sup> It is not proper to declare ILECs non-dominant when facilities used to provide their retail services are also used to provide wholesale services for which they *are* dominant.<sup>11</sup> The Commission defines market power as the ability "to raise prices by restricting its own output ... or ... to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services."<sup>12</sup> The Commission asks whether the ILECs can "leverage market power from the local exchange and exchange access markets into the markets for broadband services."<sup>13</sup> The answer is a resounding "Yes."

The Commission has previously found that an ILEC might cross-subsidize, raise its rivals costs or improperly discriminate.<sup>14</sup> There is no question that ILECs have incentive to abuse their market power in the local exchange and exchange access market to unfairly disadvantage rivals in the broadband market, "including charging higher prices to rivals for essential inputs, providing rivals with poorer quality interconnection, imposing unnecessary delays, or

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<sup>10</sup> NPRM at 14-15.

<sup>11</sup> *Id.* at 4. "ILEC plant is used to provide services with very different competitive characteristics.... [B]roadband services are often provided over certain of the same facilities as other local exchange and exchange access services."

<sup>12</sup> *Id.* at 16.

<sup>13</sup> *Id.* at 17.

<sup>14</sup> *Id.*

discriminating against rivals inappropriately in other ways.”<sup>15</sup> The ILECs seek to have the unfettered ability to provide their broadband services and are currently seeking legislation that would end their mandate to unbundle facilities used to provide data services. Their desire to obtain deregulation of those facilities highlights their incentive to unfairly disadvantage competitors when providing those wholesale facilities. Their ownership of the bottleneck facilities provides them with the means to do so. ILECs already provide inferior wholesale service to competitors for both voice and data services, thus clearly they have the incentive and ability to disadvantage competitors.

It is questionable whether inter-modal competition from cable modem providers would discipline ILEC anti-competitive behavior in the retail market without regulatory safeguards, but it would certainly not discipline the ILECs’ anticompetitive behavior in the wholesale market. In fact, the success of cable modem competition would likely increase the ILECs’ incentive to decrease wholesale service quality in order to discredit competitors and increase their own market share. Intra-modal competition from CLECs may be able to discipline the ILECs’ behavior if there were widespread competitive providers of loops, but with the ILECs still owning the vast majority of bottleneck facilities, they have means to squash intra-modal competition at any time.

### **III. ARTIFICIAL STIMULATION OF BROADBAND AVAILABILITY IS NOT NECESSARY OR PRUDENT**

The Commission need not overstate the need for increased deployment of broadband services. While the dial-up market is not a substitute for high-speed access, it is an alternative

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<sup>15</sup> *Id.*



means of gaining access to the Internet. Thus, while the dial-up market may not be relevant in evaluating an ILEC's dominant status in the broadband market, it is relevant when the Commission considers whether it needs to aggressively promote broadband deployment regardless of its finding regarding the ILEC's market dominance. The Commission suggests it may be appropriate to deregulate ILEC broadband services even where the ILEC has not been declared nondominant:

Even in situations where a fully competitive market has not yet been realized, deregulation or reduced regulation may lower administrative costs, encourage investment and innovation, reduce and offer consumer greater choice.... Accordingly, we ask whether reduced regulation of services provided by ILECs, regardless of the extent of existing competition, may foster competition and the deployment of broadband facilities used in the provision of many of these services.<sup>16</sup>

The Commission recently found in its Report to Congress that deployment of advanced services is reasonable and timely, so there is no reason to deregulate ILECs' broadband services to stimulate broadband deployment and availability.<sup>17</sup> Furthermore, such drastic deregulation is not necessary because several recent surveys indicate that supply has grossly outpaced demand for broadband services.

For example, the National Telephone Cooperative Association ("NTCA") recently released a survey of its members indicating that low take rates for broadband services may not

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<sup>16</sup> *Id.* at 21.

<sup>17</sup> In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Third Report*, CC Docket 98-146, FCC 02-33 (rel. February 6, 2002) ("706 Third Report").

justify expansion of those services to additional customers.<sup>18</sup> Sixty percent of the customers of survey respondents have access to broadband services (200 kbps downstream) now and 69% are expected to have access by the end of 2002, yet only a small percentage of customers actually subscribe to broadband services today.<sup>19</sup> According to the survey, 4% of customers with access to cable modem broadband, 3% of customers with access to DSL, and 2% of customers with access to wireless broadband subscribe to those services.<sup>20</sup> Because most of NTCA's members are rural telecom providers, this data indicates that supply is not a major concern in rural areas. NTCA suggests that the major barriers to their members offering broadband services include long loop lengths, high cost of deployment, low demand, and lack of cost-effective equipment scaled for smaller companies.<sup>21</sup>

Two recent consumer surveys found similar results regarding the low demand for high-speed Internet access throughout the country. The Information Technology Association of America ("ITAA") released a white paper, stating that while the majority of Americans have access to broadband services, many are hesitant to subscribe to them.<sup>22</sup> In a random survey of 1000 American voters, two-thirds had broadband availability but only one-fourth of those with

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<sup>18</sup> NTCA 2001 Internet/Broadband Availability Survey Report, at 1, available at [http://www.ntca.org/leg\\_reg/white/2001bb\\_survey.pdf](http://www.ntca.org/leg_reg/white/2001bb_survey.pdf) ("NTCA Report").

<sup>19</sup> NTCA Report at 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 8.

<sup>22</sup> ITAA, *Building a Positive, Competitive Broadband Agenda*, at 5, available at <http://www.positivelybroadband.com> ("ITAA White Paper").

availability subscribed to a broadband service.<sup>23</sup> ITAA suggests that lack of content is the primary reason for the demand lag and highlights that the recent increases in prices for ILEC DSL services has further reduced demand for those services.<sup>24</sup> As would be expected in a noncompetitive market, the ILECs increased their monthly rates for DSL services shortly after competitors began experiencing financial difficulties and declaring bankruptcy. This is clearly not the behavior of players in a competitive marketplace, but is classic monopolist behavior, raising prices after competitors have been driven from the market.

Hart Research/The Winston Group separately surveyed 806 consumers and found 40% were uninterested in obtaining high-speed Internet access and 36% were interested but not at the current prices.<sup>25</sup> Even after the interviewer explained some of the benefits of high-speed access, 59% of those surveyed still showed just some or very little interest in subscribing to the services.<sup>26</sup> When asked what policies should be promoted regarding broadband deployment, 74% supported policies that would “[e]ncourage competition among various DSL companies in each market, even if it means DSL is not available in some hard-to-reach rural and inner-city areas” whereas only 25% supported “[a]llow[ing] one company to build and maintain all DSL networks in a region and have unregulated ability to set rates/conditions as long as it makes DSL available in all areas of the region, including hard-to-reach rural and inner-city areas.”<sup>27</sup>

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<sup>23</sup> Harris Miller, President ITAA, *Building a Positive, Competitive Broadband Agenda*, available at <http://www.positivelybroadband.com> (“ITAA Slideshow Presentation”).

<sup>24</sup> ITAA White Paper at 5.

<sup>25</sup> Hart Research/The Winston Group, *High-Speed Take Rate Survey*, conducted November 9-14, 2001, presentation available at <http://www.voicesforchoices.com>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

These studies should lead the Commission to conclude that a broader competition policy promoting facilities-based competition for all services should not be sacrificed for the sake of rapid broadband deployment to areas where consumers will not subscribe. There is no benefit to artificially stimulating availability of broadband to consumers that have little or no interest in the services, while there is great risk in adopting policies that limit competition or competitive access to necessary facilities. Competitive choice is optimal for consumers because it allows them to reap the benefits of lower prices and better quality services.

Moreover, even if a supply side deficit existed in the deployment of broadband, one of the reasons for this deficit is the persistent anti-competitive behavior of the ILECs. While the ILECs claim that regulatory obstacles impede their deployment of broadband facilities, it is more accurate that their own actions impede the deployment of competitive broadband services to consumers. Thus, although they claim there is a supply shortage for retail broadband services, the real supply shortage results from their poor provisioning of wholesale services.

The ILECs' continued refusal to comply with the unbundling requirements of the Telecommunications Act and the inadequate enforcement of those provisions has contributed to the low rate of deployment of competitive broadband services. ILECs have found every conceivable mechanism to preclude CLECs from reaching end-user customers by denying or otherwise slow-rolling and overcharging CLECs for interconnection and access to network elements. Often CLECs are simply denied access to broadband facilities, such as DS-1 or DSL-capable loops, which are necessary to reach end-user customers under the guise that the ILECs have "no facilities" available. Too often, the ILEC *modus operandi* has been to inform the CLEC that it does not have facilities available for the CLEC to provide services to end-user customers, while, at the same time, the ILEC is already providing or marketing similar services

to those very same customers, relying on these very same, allegedly nonexistent, facilities. In the event that the ILEC does provide facilities to the CLEC, obtaining such facilities is typically an unnecessarily and painstakingly time-consuming, costly process. For example, while ILECs are obligated by the Act to provide network elements to CLECs at cost-based rates, the ILECs will typically compel the CLEC to purchase such facilities as tariffed services, identical to the requested facilities but at significantly higher rates.

In some areas, CLECs are thwarted from providing services because they cannot gain access to necessary loop facilities or to remote terminal facilities in order to collocate their equipment. Where CLECs have deployed broadband facilities by collocating in an ILEC central office, they are in many cases unable to obtain line sharing or loop qualification data in order to market and provision their broadband services to customers. Deployment of CLEC broadband services would greatly benefit from more strict enforcement of the FCC's unbundling requirements. The rare times that the ILECs are actually penalized for their intransigence or failure to abide by their market-opening obligations are simply treated as mere costs of doing business and a small price to pay to maintain monopoly control. In the end, these provisioning problems have forced many competitive carriers to delay their roll-out of broadband services, or in some cases declare bankruptcy, rather than fulfill their plans to deploy their networks to provide broadband services.

#### **IV. DEREGULATION WILL NOT GUARANTEE ADDITIONAL BROADBAND DEPLOYMENT, BUT INCREASED COMPETITION PROVIDES PROPER INCENTIVES FOR ALL CARRIERS**

Merely deregulating the ILECs would not provide incentive for them to roll-out better broadband services to more consumers. "Monopolies act predictably -- they reduce supply, raise

prices, and have little incentive to invest in new technology.”<sup>28</sup> The ILECs have already shown their propensity to behave like monopolists because they suffer no consequences. As evidenced by their delay in offering DSL-based and other advanced services, they will protect their higher profit services at the expense of providing more cost-effective, more innovative and potentially better services to consumers. Moreover, as shown by Verizon’s and SBC’s increase in DSL rates as their competitors went out of business, the ILECs are not interested in providing low-cost broadband options to consumers; they are motivated to obtain the highest monopoly profits. If they are allowed to operate as an unregulated monopoly, that is just what they will do. Non-dominant carriers are those that lack market power and cannot impose the kinds of harms that existing regulations were intended to prevent.<sup>29</sup> Here the ILECs do not qualify for non-dominant treatment because they clearly can impose harms on competitors and consumers.

Furthermore, it is not sufficient for regulators to obtain promises of deployment from the ILECs because their history shows they will not follow through on those promises without guarantees of high returns on their investments. The ILECs must take the same market risk as their competitors – that they may deploy facilities but be unable to obtain enough revenue to make that investment profitable. Their competitors have no guarantee that they will be successful as they build their networks, and regulators should not protect the ILECs by adopting policies that ensure them monopoly returns on their investments.

The ILECs have consistently made promises to regulators about deploying technologies in order to gain regulatory approval for mergers; however, they have consistently broken those

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<sup>28</sup> James Glassman, *Best Remedy for Recession? Break Up the Bells*, December 10, 2001, available at <http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131>.

promises.<sup>30</sup> Based on statements in the ILECs' annual reports, "[b]y 2001, over half of America's households should have been rewired with fiber optics; [however,] none of these statements proved to be true, even though state and federal laws were changed to give the Bells more money for construction."<sup>31</sup> For example, despite strong financial performance and a flexible regulatory framework in Pennsylvania, BA-PA (now Verizon) failed to increase investment in its network.<sup>32</sup> Additionally, SBC — the Bell company that now owns three of the original seven Bells — promised to compete in 30 additional major markets outside of its region within 30 months of the SBC-Ameritech merger.<sup>33</sup> SBC claimed that it needed further capital from the merger with Ameritech in order to enter other local markets and compete against the other Bell Companies. While the SBC-Ameritech merger was consummated in October 1999, SBC has yet to compete in those markets outside of its region. Under the merger conditions placed on SBC by the FCC, it is liable for voluntary penalties for failure to enter the 30 out of region markets; however, SBC has not paid any penalties for its failure to compete.

The best method to achieve "access for all" is to adopt and enforce policies that promote

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<sup>29</sup> NPRM at 6.

<sup>30</sup> Duane D. Freese, *Who Do You Trust? Bush or the Bells?*, December 13, 2001, available at <http://www.techcentralstation.com/NewsDesk.asp?FormMode=PolicyTracksArticles&ID=146>.

<sup>31</sup> New Networks Institute, *Tauzin-Dingell: Fact Sheet 1, The Bells' Broken Broadband Promises Cost Customers \$58 Billion and Their Fiber-Optic Future*, available at <http://www.newnetworks.com/tauzinfactsheet1.htm>; See also New Networks Institute, *Tauzin-Dingell: Fact Sheet 2, Broken Broadband Promises of Verizon, (NYNEX, Bell Atlantic, etc.)*, available at <http://www.newnetworks.com/tauzinfactsheet2.htm>.

<sup>32</sup> Economics and Technology, Inc., *Broken Promises, A Review of Bell Atlantic-Pennsylvania's Performance Under Chapter 30* (rel. June 1998), at iii, ("Having made its 'commitment' and been granted its 'alternative regulation' reward, ... Bell Atlantic-Pennsylvania ... paid more attention to escaping from, rather than fulfilling, the terms of its promised upgrade.").

<sup>33</sup> New Networks Institute, *Tauzin-Dingell: Fact Sheet 5: Liar, Liar, SBC's Pants on Fire ----Where's the Competition?*, available at <http://www.newnetworks.com/tauzinfactsheet5.htm>.

facilities-based competition and eliminate the ILEC market power. Competitive providers were the driving forces behind the widespread deployment of advanced services and they will continue to drive the development of new technologies. Fearing they would cannibalize their existing T-1 revenue stream, the ILECs delayed introduction of cheaper DSL technology, and made access to DS-1 loops, other facilities, and combinations of such facilities unnecessarily cumbersome at best, until CLECs began marketing DSL-based and other advanced services in earnest.<sup>34</sup>

Although DSL technology has been available since the 1980s, only recently did local telephone companies begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from ... the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.<sup>35</sup>

Because the ILECs "were getting great rates from T-1 lines, and consumers were buying highly profitable second and third lines for their slow-motion modems and their fax machines, [they] kept cheaper DSL on the shelf for a decade."<sup>36</sup> By allowing the ILECs to maintain an unfettered monopoly, regulators can virtually assure a slowdown in broadband technological advancement.

The history of emerging competition in the long distance market foreshadows the possibilities for local telecom and broadband competition. When MCI began offering

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<sup>34</sup> *An ALTS Analysis: Local Competition and the New Economy*, February 2001, at 4, available at <http://www.altis.org/Filings/020201Analysis.pdf> ("ALTS New Economy Analysis").

<sup>35</sup> ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, *Economic Report of the President*, February 1999, pp. 187-188, <http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf>).

<sup>36</sup> James Glassman, *Best Remedy for Recession? Break Up the Bells*, December 10, 2001, available at <http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131>.



competitive long distance services, it focused on the small business market where it could obtain margins that justified its business plan. As its market share and revenues grew, it expanded its customer base to include residential customers. Even though MCI began by reselling some of AT&T's long distance services, there are now several, competing facilities-based long distance networks. Similarly, CLECs have typically begun establishing a footprint with mostly business customers. Some CLECs have focused on serving residential customers at the outset, and many others intend to do so when it becomes more economically viable to do so. There is no market failure for local and broadband competition where CLECs now offer services primarily to business customers in dense population centers rather than to residential customers in more sparsely populated markets.

**V. DEREGULATION OF ILECS WOULD CREATE, AT BEST, A DUOPOLY IN THE RESIDENTIAL BROADBAND MARKET**

Exempting the ILECs from opening their markets to competitors would destroy the new entrepreneurial competitive telecom companies and, at best, leave consumers with just two choices – the ILEC or the cable modem provider. This would create a duopoly, not widespread competition. For years, cellular telephone service was a duopoly, with just two providers in each market. Prices were high, service quality was low, and the U.S. fell behind Europe in cellular usage. After the FCC added 3 or 4 new PCS providers in each market, rates have fallen dramatically, digital technology was introduced, and mobile phones became much more popular. Since ILECs have already shown their propensity to raise rates when the threat of competition is low, it is clear that they would continue to do so if they were able to legally block out competitive providers. Furthermore, deregulating ILECs for broadband services would grant them a virtual monopoly in the non-residential market because business customers do not have

access to cable modem providers.

The ILECs continue to dominate the market for DSL-based services regardless of their position *vis a vis* the cable modem providers. DSL lines in North America totaled over 4.7 million at the end of third quarter 2001, with ILECs accounting for 85% of the total, followed by CLECs with 14% and IXC's with about 1%.<sup>37</sup> TeleChoice, Inc. estimated that residential cable modem providers have a 70-30 market share advantage over residential DSL providers.<sup>38</sup> While the ILECs would point to this statistic as evidence that they need relaxed regulation on their DSL services and facilities, TeleChoice, Inc. does not include regulatory hurdles as one of the various reasons it cites to explain why cable broadband providers are succeeding over residential DSL providers. TeleChoice, Inc. explains that cable providers can provision services faster than DSL providers, a day or two versus weeks for the ILECs to deploy DSL facilities.<sup>39</sup> Moreover, cable modem providers offer a bundled service including voice, video and data with a lower packaged price for customers that subscribe to all services.<sup>40</sup> Compare this to the ILECs strategy of raising its prices in the wake of bankruptcies of its competitors and one can see why there is an allure to cable modem broadband service over DSL service of the ILECs that has nothing to do with excess regulation of the ILECs' DSL services:

For too long the Bells have focused on winning the battle with the IXC's, holding them out of the local market, while slowly fighting their way to offering long distance. All this time they've treated residential broadband

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<sup>37</sup> TeleChoice, Inc., *North American DSL Market Reaches 4.7 Million*, available at <http://www.xdsl.com/content/tcarticles/wp112701.asp>.

<sup>38</sup> TeleChoice, Inc., *It Ain't Over 'Til It's Over: But cable is running away with the race for the residential broadband market*, available at <http://www.xdsl.com/content/xdsltoday/tcperspective/CableIsKillingDSL.asp>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

and the competition from MSOs like it was something they could turn to and win when the other fight was over. Even over the past few months we've seen the huge effort they put behind trying to put the nail in the coffin of the IXCs with the Tauzin-Dingell bill, while at the same time their broadband businesses stumbled in the wake of ill-advised price hikes. Their focus needs to change if they want to win in the residential market.<sup>41</sup>

When all providers have equal access to essential facilities, there may be less reason to maintain different regulatory structures between varying broadband network architectures. However, that is not the state of the industry at this time. Thus it is appropriate for providers to be regulated in different manners based on their level of market power. The ILECs built their networks over decades with a monopoly profit guaranteed by the government, thus it is fair to open the ILECs' networks to competition to compensate for the decades of government-regulated monopoly.

### **CONCLUSION**

For the foregoing reasons, ALTS urges the Commission to review comments filed in this proceeding to define the broadband market and solicit further comment based on that definition before determining the status of the ILECs in that market. Moreover, ALTS urges the Commission not to declare the ILECs non-dominant in the retail broadband market while they continue to possess market power in the wholesale market.

Respectfully Submitted,

**Association for Local  
Telecommunications Services**

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<sup>41</sup> *Id.*

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CC Docket No. 01-337  
March 1, 2002

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